Supreme Court, U.S.
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No. 94-835

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1994

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CROWN CORK & SEAL CO., INC.,
*Petitioner,*

v.

UNITED STEELWORKERS OF AMERICA,
AFL-CIO-CLC,
*Respondent.*

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**On Writ of Certiorari to the United States Court of Appeals for the Third Circuit**

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## BRIEF FOR PETITIONER

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## QUESTION PRESENTED

Whether civil actions under the Worker Adjustment and Retraining Notification Act, 29 U.S.C. §§ 2101-09, are subject to the six-month statute of limitations of Section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b).

## PARTIES TO THE PROCEEDING AND RULE 29.1 STATEMENT

In addition to petitioner Crown Cork & Seal Company, Inc. and respondent United Steelworkers of America, AFL-CIO-CLC, the Chamber of Commerce of the United States of America appeared in the Court of Appeals as *amicus curiae* in support of Crown. Crown has no parent company. Crown subsidiaries (other than wholly owned subsidiaries) are Crown Cork Company (Belgium) N.V., Crown Can Hong Kong, Ltd., The Crown Cork Company (East Africa) Ltd., Crown Cork del Peru, S.A., Crown Cork & Seal (Thailand) Co., Ltd., Emirates Can Company, Ltd. (Dubai, UAE), Crown Cork Company (Zambia) Limited, and Crown Cork Company (1958) (Pvt) Limited.

In the Court of Appeals, this case was consolidated with *Thomas v. North Star Steel Co.*, No. 93-7613, in which the following parties appeared: Charles A. Thomas, Darren Boop, Robert W. Bower, William D. Bridge, James Clingan, Neal B. Housner, Jonathan L. Noaker, Wayne D. Orner, Gerald W. Ranck, Harold E. Van Sickle, Jr., Richard A. Winter, Eugene L. Witmer, Sr., North Star Steel Company, and as *amici curiae*, the Chamber of Commerce of the United States of America; the Oil, Chemical and Atomic Workers International Union; the United Mine Workers of America; the NLG/Sugar Law Center for Economic & Social Justice; and the International Union, United Automobile, Aerospace & Agricultural Implement Workers of America.

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**On Writ of Certiorari to the United States Court of Appeals for the Third Circuit**

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## BRIEF FOR PETITIONER

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### OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 1a-16a) is reported at 32 F.3d 53. The opinion of the District Court on the merits (Pet. App. 17a-23a) is reported at 833 F. Supp. 467, and its order certifying the legal issue for immediate appeal under 28 U.S.C. § 1292(b) (Pet. App. 24a) is unreported.

### JURISDICTION

The judgment of the Court of Appeals was entered on August 10, 1994. The petition for a writ of certiorari was filed on November 8, 1994, and was granted on January 6, 1995 (J.A. 16). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

## STATUTORY PROVISION INVOLVED

The relevant statutory provision is the Worker Adjustment and Retraining Notification Act, 29 U.S.C. §§ 2101-09, which is reproduced in full in the appendix to the Petition for a Writ of Certiorari (Pet. App. 25a-33a).

## STATEMENT OF THE CASE

This case arises out of the closing of a unionized manufacturing plant operated by petitioner Crown Cork & Seal Company, Inc. ("Crown"). Over a year after this plant closing, respondent United Steelworkers of America, AFL-CIO-CLC (the "Union"), commenced this action for damages on the ground that Crown did not provide the advance notice required by the Worker Adjustment and Retraining Notification Act (the "WARN Act"), 29 U.S.C. §§ 2101-09. The question now before this Court is whether the Union's WARN Act claims are subject to the six-month statute of limitations of Section 10(b) of the National Labor Relations Act (the "NLRA"), 29 U.S.C. §160(b), or whether they are governed by some state limitations period.

### A. Statutory Framework

Congress enacted the WARN Act in 1988 to provide unions, employees and local governments with advance notice of impending plant closings and mass layoffs. *See* 29 U.S.C. § 2102(a); 20 C.F.R. § 639.1(a). The WARN Act generally requires employers to provide sixty days' notice of a mass layoff or plant closing to affected employees (or their union representative) and to the local government. *Id.* The notice period may be reduced if, for example, a mass layoff or plant closing results from unforeseeable business circumstances or from a natural disaster, or if an employer had been seeking business or capital to avert the closing or layoff. 29 U.S.C. § 2102(b). The WARN Act expressly provides that the

giving of notice does not violate the NLRA. 29 U.S.C. § 2108.

In virtually all cases, employees will become aware of any statutory violation immediately upon losing their job. This is so because the WARN Act's notice obligation is triggered by a defined "employment loss" within a 30-day (or in some circumstances 90-day) period. 29 U.S.C. §§ 2101(a)(2)-(3), 2102(d). The WARN Act defines "employment loss" as a termination, a layoff exceeding six months, or a 50% reduction in work hours for each month of a six-month period. 29 U.S.C. § 2101(a)(6). WARN Act notification is required only prior to a "plant closing" affecting at least 50 employees or a "mass layoff" of a third of a facility's workforce or 500 employees. 29 U.S.C. § 2101(a)(2)-(3). Such a dramatic reduction in force cannot be easily concealed. Hence, affected employees will be aware of a possible WARN Act claim immediately upon job loss or, at the latest, six months after a plant closing or mass layoff.

The WARN Act creates a private cause of action for employees or their union representative, who can sue an employer for statutorily-specified money damages in any district where the employer transacts business. 29 U.S.C. § 2104. The Act, however, does not specify the statute of limitations that governs such claims. Accordingly, this Court must "borrow" a limitations period for WARN Act claims from elsewhere.

### B. Facts And Proceedings Below

Crown is a national manufacturer of cans and ends for the food and beverage industries. It manufactures its products in more than 50 plants located throughout the continental United States. Crown products are sold in every state of the Union and in many countries abroad.

On or about September 30, 1991, Crown ordered a shutdown of its unionized manufacturing plant in Perry, Georgia. (J.A. 9). As a result, Crown laid off ap-

proximately eighty-five Union represented employees at the plant. (J.A. 10). The Union alleges that Crown failed to provide it with 60 days' advance notice of the shutdown. (J.A. 10). Crown denies the Union's allegations and maintains that it "provided notice in compliance with WARN." (J.A. 14). On October 15, 1992, more than a year after the shutdown, the Union instituted this action. It chose to sue Crown in the United States District Court for the Eastern District of Pennsylvania, rather than in Georgia, the site of the relevant employment action.

Crown moved for summary judgment on the ground that the Union's claim was time-barred because WARN Act actions were governed by the six-month limitations period contained in Section 10(b) of the NLRA, 29 U.S.C. § 160(b).

**C. The District Court's Decision**

In a Memorandum and Order dated August 24, 1993, the District Court denied Crown's motion for summary judgment. (Pet. App. 17a-23a). The District Court concluded that some Pennsylvania state limitations period, rather than the NLRA, provided the applicable limitations period for the Union's WARN Act claim. (Pet. App. 21a-22a). The Court declined to decide, however, which Pennsylvania limitations period applied. (Pet. App. 22a). Recognizing that the issue before it involved a controlling question of law as to which there was substantial ground for difference of opinion, the District Court certified its decision for immediate appeal. (Pet. App. 24a).

**D. The Decision Of The Court Of Appeals**

The United States Court of Appeals for the Third Circuit affirmed. (Pet. App. 1a-16a). The Court recognized that the WARN Act and the NLRA both imposed on employers the obligation to provide notice of plant closings, and that the WARN Act bore a "family resem-

blance" to the NLRA. (Pet. App. 10a). The Court also acknowledged that none of four proposed Pennsylvania limitations periods "provide perfect analogies to WARN." (Pet. App. 15a). Nevertheless, the Court declined to borrow the NLRA's limitations provision and ruled instead that the Union's suit was subject to a state limitations period, though the Court refused to decide which of the four proposed limitations periods applied. (Pet. App. 15a-16a).

The Court of Appeals recognized that the WARN Act's broad venue provision allowed the Union to sue Crown in Pennsylvania for an alleged WARN Act violation which occurred in Georgia, and that WARN Act claims likely would be subject to a limitations period from the forum state, *i.e.* Pennsylvania. (Pet. App. 14a n.4). Nonetheless, the Court downplayed the risk of forum shopping created by its refusal to adopt a uniform limitations period for WARN Act claims; despite the fact the plaintiff in this case filed suit over 700 miles from the affected plant, the Court asserted that "workers will gain few advantages by suing in a court far from the site of injury." (Pet. App. 14a) (quoting *United Paperworkers Int'l Union v. Specialty Paperboard, Inc.*, 999 F.2d 51, 56 (2d Cir. 1993)).

## SUMMARY OF ARGUMENT

I. Currently before the Court is the issue of the appropriate limitations period for the WARN Act, a federal notice statute which does not contain an express statute of limitations. In recent borrowing decisions, this Court has consistently scrutinized both state and federal statutes to determine which offered the "closer analogy" to the cause of action at issue, and then borrowed a limitations period from that statute, be it state or federal, if the limitations period was consistent with federal policies and litigation practicalities. *See Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, 483 U.S. 143 (1987); *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983). Though this Court has articulated a "fallback"

presumption that Congress intended for state law to serve as the primary borrowing source, that presumption should not apply where a federal statute clearly provides the best analogy to the cause of action in question and where borrowing a uniform federal limitations period furthers federal interests in uniformity and certainty and minimizes the danger of forum shopping.

II. The NLRA offers the best analogy to the WARN Act in state or federal law. It is, therefore, an appropriate borrowing source for the WARN Act. The NLRA and the WARN Act both require employers to provide advance notice of impending plant closings or mass layoffs. They also share common language and a common purpose. Both aim to ameliorate the effects of unemployment and to strike a balance between the interests of employers in operating their businesses and employees who suffer the consequences of managerial actions. Indeed, the WARN Act's legislative history confirms that Congress intended to model the WARN Act on the NLRA.

In contrast to the NLRA, no nationally available state law cause of action provides a suitable analogy to the WARN Act. The WARN Act is a statutory creation without common law roots. Therefore, it is not surprising that state law does not afford a cause of action with the "commonality of purpose" and "similarity of elements" which the WARN Act shares with the NLRA.

III. Federal policies and the practicalities of WARN Act litigation favor borrowing the limitations period from the NLRA. The WARN Act seeks to provide prompt relief to affected employees; this hinges upon a limitations period that encourages prompt litigation. Borrowing the NLRA's limitations period also furthers the federal policy favoring the rapid resolution of employment disputes. In addition, given the WARN Act's broad venue provision and its multi-state character, state-law borrowing would encourage forum shopping, undermine uniformity, and foster time-consuming and expensive collateral litigation. Finally, the subject matter of WARN

Act litigation—plant closings and mass layoffs—favors a short limitations period. Following a plant closing, terminated employees and witnesses disburse, and records may be lost or destroyed. Numerous plaintiffs, both represented and unrepresented, have instituted WARN Act lawsuits within six months, confirming that a six-month limitations period is both feasible and appropriate.

## ARGUMENT

### I. COURTS SHOULD BORROW THE LIMITATIONS PERIOD FROM THE CLOSEST ANALOGY IN STATE OR FEDERAL LAW UNLESS FEDERAL POLICIES AND LITIGATION PRACTICALITIES REQUIRE A DIFFERENT COURSE

Congress often fails to provide express limitations periods for federal causes of action. *See DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151, 158 (1983). In such circumstances, this Court does not ordinarily "assume that Congress intended that there be no time limit on actions at all." *Id.* Rather, this Court " 'borrow[s]' the most suitable statute or other rule of timeliness from some other source." *Id.* This Court has created a two-step borrowing analysis. First, this Court searches for the closest analogy to the cause of action in question. Second, this Court considers whether borrowing the limitations period from the closest analogy is consistent with federal policies and litigation practicalities.

#### A. Courts Should First Attempt To Determine Which Of The Competing Statutory Alternatives Offers The Closest Analogy To The Federal Statute In Question

##### 1. *After Scrutinizing Both State And Federal Statutes, This Court Has Routinely Borrowed The Limitations Period Contained In The Most Analogous Statute*

In recent limitations borrowing decisions, this Court has scrutinized both state and federal statutes to determine which offered the "closer analogy" to the cause of

action at issue, and then borrowed a limitations period from the statute—either state or federal—that provided the best analogy, so long as the limitations period was consistent with federal policies and litigation practicalities. For example, in *Agency Holding Corporation v. Malley-Duff & Associates, Inc.*, 483 U.S. 143 (1987), this Court applied a Clayton Act limitations period to civil RICO claims because RICO and the Clayton Act shared "similarities in purpose and structure," while there was no "satisfactory state law analogue to RICO." *Id.* at 152.

Similarly, in *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983), this Court ruled that the NLRA provided an analogy to "hybrid" claims under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, "more apt than any of the suggested state-law parallels." *Id.* at 169. And in *Reed v. United Transportation Union*, 488 U.S. 319 (1989), this Court borrowed state limitations periods for claims under Section 101(a)(2) of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 411(a)(2), because the claims were "readily analogized . . . to state personal injury actions," *id.* at 326, and federal law "d[id] not supply a more analogous statute," *id.* at 334.

### 2. *Courts Should Not Presume That State Limitations Periods Govern When There Are More Analogous Federal Statutes Of Limitations*

This Court has categorically rejected the suggestion that "federal courts always should apply the state statute of limitations most analogous to each individual case whenever a federal statute is silent on the proper limitations period." *Agency Holding Corp.*, 483 U.S. at 146. On occasion, this Court has stated that, as a "fallback rule of thumb," it has presumed that Congress intended for courts to borrow the most analogous limitations period from state law. *DelCostello*, 462 U.S. at 158 & n.12; *see, e.g., Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 355 (1991) (plurality opin-

ion) [hereinafter *Lampf*]; *Agency Holding Corp.*, 483 U.S. at 147. Nevertheless, this Court has often borrowed a limitations period for a federal cause of action from elsewhere in federal law. *See, e.g., Lampf*, 501 U.S. at 355; *Agency Holding Corp.*, 483 U.S. at 156; *DelCostello*, 462 U.S. at 169; *McAllister v. Magnolia Petroleum Co.*, 357 U.S. 221, 226 (1958).

In fact, it is questionable how weighty the "fallback" presumption of state law borrowing should be, and whether it should apply at all in this case. First, the borrowing of state limitations periods is not mandated by the Rules of Decision Act, 28 U.S.C. § 1652, or any other aspect of federal law. *See, e.g., DelCostello*, 462 U.S. at 159 n.15; *id.* at 174 n.1 (O'Connor, J., dissenting). Rather, the practice of state law borrowing developed as an "intensely practical solution[] to a practical problem in the administration of justice." *McAllister*, 357 U.S. at 229 (Brennan, J., concurring). As Justice Brennan explained:

> In *the absence of any comparable federal statute of limitations* which might be applied, the Court had four choices: (1) No period of limitations at all; (2) an arbitrary period applicable in all like cases; (3) the flexible but uncertain doctrine of laches; and (4) state statutes of limitations. *The state statutes were chosen by default.*

*Id.* (emphasis added). There is little reason to apply a default rule which developed in "the absence of any comparable federal statute of limitations," when a federal cause of action actually has a close analogy in federal law.

Second, Congress passed the WARN Act in 1988, after this Court had circumscribed its presumption of state law borrowing and selected uniform federal limitations periods for civil RICO claims and for hybrid § 301 claims. *Agency Holding Corp.*, 483 U.S. at 150; *DelCostello*, 462 U.S. at 172. This Court should not presume that Congress, which adopted the WARN Act to provide prompt

notice and relief from the rigors of unemployment, would consign WARN Act claims to the vagaries of, and collateral litigation regarding, diverse state limitations periods. To the contrary, it is reasonable to conclude that Congress intended for this Court to select a limitations period from a statute with "similarities in purpose and structure," regardless of whether that statute was state or federal. *Agency Holding Corp.*, 483 U.S. at 152.[1]

### B. Courts Should Ensure That The Limitations Period From The Closest Analogy Is Consistent With Federal Policies And Litigation Practicalities

Courts should borrow a limitations period from the best analogy, be it state or federal, so long as the limitations period is consistent with federal policies and litigation practicalities. *See Agency Holding Corp.*, 483 U.S. at 153; *DelCostello*, 462 U.S. at 172. In applying the second part of this standard, this Court has identified three key areas of inquiry: (1) whether a uniform limitations period is needed "to avoid intolerable 'uncertainty and time-consuming litigation,'" *Agency Holding Corp.*, 483 U.S. at 150 (quoting *Wilson v. Garcia*, 471 U.S. 261, 272 (1985)); (2) whether the use of varying state limitations periods would "'present the danger of forum shopping and, at the very least, would virtually guarante[e] . . . complex and expensive litigation . . . over what should be a straightforward matter,'" *Lampf*, 501 U.S. at 357 (quoting *Agency Holding Corp.*, 483 U.S. at 154) (internal quotations omitted); and (3) whether the federal limitations period is "designed to accommodate a balance of interests very similar to that at stake" in the cause of action at issue. *DelCostello*, 462 U.S. at 169.

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[1] This Court has described federal borrowing as a "closely circumscribed exception," because of congressional awareness of this Court's state law borrowing practice. *See, e.g., Lampf*, 501 U.S. at 356; *Agency Holding Corp.*, 483 U.S. at 147. Congressional expectations likely changed, however, after this Court borrowed federal limitations periods in *DelCostello* and *Agency Holding Corp.* Hence, in this case, there should not be a strong presumption favoring state law borrowing.

Moreover, in assessing the federal policies at stake and the practicalities of litigation, this Court should recognize that borrowing a uniform federal limitations period generally furthers "federal interests in uniformity, certainty, and the minimization of unnecessary litigation," *see Wilson v. Garcia*, 471 U.S. 261, 275 (1985); the use of state limitations periods almost always creates the danger of forum shopping. *Agency Holding Corp.*, 483 U.S. at 154. Accordingly, when the closest analogy to a federal cause of action is found elsewhere in federal law, courts generally should borrow a uniform federal limitations period.

## II. THE NLRA OFFERS A CLOSER ANALOGY TO THE WARN ACT THAN ANY STATE LAW ALTERNATIVE

Because the NLRA offers the best analogy to the WARN Act in state or federal law, and because federal policies and litigation practicalities favor a uniform limitations period for WARN Act claims, this Court should borrow the NLRA's six-month limitations period for the WARN Act. The NLRA, unlike any one state law cause of action, offers the closest analogy to the WARN Act.[2] The WARN Act and the NLRA both require employers to provide advance notice of impending plant closings or mass layoffs. Not only do the two statutes impose overlapping duties nationwide, they also have common language and a common purpose.

Indeed, the WARN Act's legislative history reveals an intent to pattern the WARN Act after the requirements

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[2] Specialized state statutes, such as the handful of state plant closing laws, offer inappropriate borrowing sources. Because such specialized analogies are not available in most states (including Pennsylvania and Georgia), they could not be borrowed nationwide. As a result, claims would have to be characterized differently on state-by-state basis. The resulting "[t]ime-consuming litigation as to the collateral question of the appropriate statute of limitations" would create uncertainty and deter potential plaintiffs from filing suit. *See Reed*, 488 U.S. at 326.

of the NLRA. The same cannot be said of any state law cause of action. Thus, the NLRA provides the "closest fit" with the WARN Act and therefore offers a more appropriate borrowing source than any state law alternative. *See Agency Holding Corp.*, 483 U.S. at 148; *DelCostello*, 462 U.S. at 171-72.

### A. The NLRA And The WARN Act Both Require Advance Notice Of Plant Closings

The overall objectives of national labor policy, "reflected in established principles of federal law, require that the rightful prerogative of owners independently to rearrange their businesses and even eliminate themselves as employers be balanced by some protection to the employees from a sudden change in the employment relationship." *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 549 (1964). Accordingly, the NLRA, the keystone of federal labor law, "confer[s] certain affirmative rights on employees and [places] certain enumerated restrictions on the activities of employers." *American Ship Building Co. v. NLRB*, 380 U.S. 300, 316 (1965).

Among the protections the NLRA affords the American represented workforce is the right to receive advance notice of an impending plant closing, relocation, or other similar managerial action. This is required in order to ensure a meaningful opportunity to bargain over the effects of that action. *See First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 681-82 (1981) (advance notice required to bargain over effects of plant closing); *Penntech Papers, Inc. v. NLRB*, 706 F.2d 18, 26 (1st Cir.), *cert. denied*, 464 U.S. 892 (1983); *see also Dubuque Packing Co.*, 303 N.L.R.B. 386, 396-97 (1991) (advance notification required for decisional bargaining over work relocation), *enf'd*, 1 F.3d 24 (D.C. Cir. 1993), *cert. granted*, 114 S. Ct. 1395, *cert. dismissed*, 114 S. Ct. 2157 (1994). A failure to provide this statutorily required notice constitutes an unfair labor practice subject to the NLRA's six-month limitations period. *See* 29 U.S.C.

§ 158(a)(5); *First National Maintenance Corp.*, 452 U.S. at 681.[3]

Thus, long before the WARN Act became law, employers with represented employees were already providing advance notice of plant closings and mass layoffs to comply with their statutory obligations under the NLRA. In a sense, the WARN Act simply standardized the notice required for represented employees and extended the notice requirement to cover both represented and unrepresented employees. *See Halkias v. General Dynamics Corp.*, 31 F.3d 224, 232 (5th Cir.), *rehearing en banc granted*, 31 F.3d 248 (5th Cir. 1994).

Moreover, the WARN Act shares a common purpose with the NLRA. The NLRA's advance notice requirement protects employees from sudden dislocation and enables unions to secure additional benefits for their members. *See First National Maintenance Corp.*, 452 U.S. at 681-82; *Kirkwood Fabricators, Inc. v. NLRB*, 862 F.2d 1303, 1306-07 (8th Cir. 1988); *see also Riedel International*, 300 N.L.R.B. at 282-83 (advance notice and bargaining required to ameliorate effects on employees of sale of company and cessation of operations). Indeed, this Court has recognized that unions often have intervened before a plant closing to save a failing business "by lending technical assistance, reducing wages and benefits or increasing production and even loaning part of earned wages to forestall closures." *First National Maintenance Corp.*, 452 U.S. at 681 n.19.

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[3] Although the NLRA does not specify the amount of pre-implementation notice required, it must be sufficiently in advance of the closing to allow meaningful negotiations. *See, e.g., Penntech Papers, Inc.*, 706 F.2d at 26 ("A concomitant element of 'meaningful' bargaining is timely notice to the union of the decision to close, so that good faith bargaining does not become futile or impossible."); *Daniel I. Burk Enterprises, Inc.*, 313 N.L.R.B. 1263, 1268 (1994); *Riedel International*, 300 N.L.R.B. 282, 284 (1990); *Los Angeles Soap Co.*, 300 N.L.R.B. 289, 295 (1990); *Metropolitan Teletronics Corp.*, 279 N.L.R.B. 957, 959 n.14 (1986), *enf'd*, 819 F.2d 1130 (2d Cir. 1987).

The WARN Act's notice requirement also affords unions, employees, and local governments the opportunity to act promptly to ameliorate the hardships of unemployment, whether by meeting with the employer to offer incentives to remain open, or by offering postemployment training or other unemployment assistance to affected employees. *See, e.g.*, 20 C.F.R. § 639.1(a); Labor Department's Statement and Final Regulations on the Worker Adjustment and Retraining Notification Act, 54 Fed. Reg. 16042, 16046 (1989).[4]

There are other similarities in structure between the NLRA and the WARN Act. Under both statutes, the amount of notice may be reduced when an employer can demonstrate special or emergency circumstances. The WARN Act contains three such exceptions. *See* 29 U.S.C. § 2102(b); 20 C.F.R. § 639.9; 54 Fed. Reg. at 16061-63.[5] The NLRA also allows for a reduction in the notice

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[4] Both the NLRA and the WARN Act afford protection not only to the affected employee but the community at large as well. The NLRA proscribes management practices "which affect commerce and are inimical to the general welfare," 29 U.S.C. § 141(b), while the WARN protects both individual workers and local communities. 20 C.F.R. § 639.1(a) ("WARN also provides for notice to State dislocated worker units so that dislocated workers assistance can be promptly provided."); *see also Comments Submitted to the Labor Department in Response to Its Policy Paper on the Worker Adjustment and Retraining Notification Act*, 228 Daily Lab. Rep. (BNA), Nov. 28, 1988, at E-1 (WARN Act's principal authors "emphasize that WARN is a remedial statute intended to provide significant protection to workers and local communities.").

[5] The WARN Act's faltering company exception allows for reduction in the notice period if "the employer was actively seeking capital or business which, if obtained, would have enabled the employer to avoid or postpone the shutdown and the employer reasonably and in good faith believed that giving the notice required would have precluded the employer from obtaining the needed capital or business. 29 U.S.C. § 2102(b)(1). The unforeseeable business circumstances exception provides for reduced notice in the event that the closing or mass layoff "is caused by business circumstances that were not reasonably foreseeable as of the time

period in emergency circumstances. *See, e.g., Daniel I. Burk Enterprises, Inc.*, 313 N.L.R.B. at 1268 (providing examples of circumstances permitting reduced notice); *Los Angeles Soap Co.*, 300 N.L.R.B. at 295-96 (same).[6]

The NLRA and the WARN Act also provide analogous remedies for violations of their respective notice requirements. Failure to provide advance notice required by the WARN Act requires payment of back pay and benefits for each day of the violation. 29 U.S.C. § 2104(a)(1). Similarly, an employer's failure to provide advance notice or otherwise to satisfy its effects bargaining obligations under the NLRA constitutes an unfair labor practice, for which back pay is the usual remedy. *See, e.g., Daniel I. Burk Enterprises, Inc.*, 313 N.L.R.B. at 1272; *National Car Rental System, Inc.*, 252 N.L.R.B. 159, 164 (1980), *modified and enf'd*, 672 F.2d 1182 (3d Cir. 1982).[7]

### B. Legislative History Confirms That Congress Modeled The WARN Act On The NLRA

Congress's intention to model the WARN Act on the NLRA and to use the WARN Act to extend the NLRA's notice protection to unrepresented employees is evident

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that notice would have been required." 29 U.S.C. § 2102(b)(2)(A). Finally, the natural disaster exception excuses notice in the event that the closing or mass layoff is caused by a natural disaster such as a flood, earthquake, or drought. 29 U.S.C. § 2102(b)(2)(B).

[6] Circumstances in which the NLRA's notice requirement has been excused include the sudden refusal of an employer's bank to continue extending credit, *Raskin Packing Co.*, 246 N.L.R.B. 78, 80 (1979), the unanticipated denial of an employer's loan request, *M & M Transportation Co.*, 239 N.L.R.B. 73, 75 (1978), and a bankruptcy trustee's closure of a business and termination of employees, *Yorke v. NLRB*, 709 F.2d 1138, 1143 (7th Cir. 1983), *cert. denied*, 465 U.S. 1023 (1984).

[7] Applying state limitations periods to WARN Act claims would allow two different limitations periods to govern claims for the very same "failure to give notice." A union must raise its NLRA claim within six-months, but it will have a different (and probably lengthier) period to raise the same claim under the WARN Act.

not only from its express references to the NLRA in the WARN Act's statutory language, *see, e.g.*, 29 U.S.C. §§ 2103(2) and 2108 (thrice referencing the NLRA), but also from the debates regarding the WARN Act and its predecessor bills. The "clearest current" in the legislative history of the WARN Act is the reliance on the NLRA model, providing strong support for incorporation of the NLRA's six-month limitations period into the WARN Act. *See Agency Holding Corp.*, 483 U.S. at 151.

The principal precursors of the WARN Act introduced in the 100th Congress would have required employers not only to notify but also to consult with employees or their exclusive representative before closing a plant. S. 538, 100th Cong., 1st Sess. (1987); H.R. 1122, 100th Cong., 1st Sess. (1987). In other words, the initial formulation of the WARN Act was identical to the NLRA's purpose of requiring that employers both notify and consult or bargain with employees prior to a plant closing. The House Committee on Education and Labor observed that the consultation requirement in H.R. 1122 expanded upon the NLRA's effects bargaining requirement:

> [T]here are a number of important similarities between the duty to consult and the NLRA duty to bargain. Like the bargaining obligation, the duty to consult requires the employer to meet with the union, without preconditions, "at reasonable times" and as often necessary to conduct a thorough exploration of alternatives, and the employer must be represented by one who has sufficient authority to conduct meaningful bargaining. . . .
>
> Most important of all, the employer must approach the consultation process with a good-faith willingness to explore the reasons for and possible alternatives to the proposed closing or mass layoffs.

H.R. Rep. 285, 100th Cong., 1st Sess. 34 (1987).[8] Ultimately, congressional proponents of plant closing legis-

[8] The principal sponsor of the WARN Act in the House of Representatives noted that the legislative history of the WARN Act "is

lation eliminated the consultation requirement to garner additional support. *See, e.g.*, 134 Cong. Rec. 17,867-68 (1988) (remarks of Rep. Ford); 134 Cong. Rec. 13,680-81 (1988) (remarks of Sen. Metzenbaum).[9]

Nevertheless, Congress believed that even a notice requirement would encourage bargaining over the effects of a plant closing. The House committee report noted that

> pre-notification . . . provide[s] an opportunity for the employer and the representative of the affected employees to explore alternatives to a proposed closing or mass layoff, thereby providing employees an opportunity to discuss the reason for decisions that will have a tremendous impact on their lives.

H.R. Rep. 285, 100th Cong., 1st Sess. 32 (1987).

Likewise, the Senate committee report on the WARN Act's precursor observed that notice of a plant closing "may afford an opportunity . . . for ameliorative measures to be considered." S. Rep. 62, 100th Cong., 1st Sess. 22-23 (1987). Congress's desire to have the WARN Act en-

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simply provided through the Committee reports on S. 538 and H.R. 1122, and the conference report on H.R. 3." 134 Cong. Rec. 17,868 (1988) (remarks of Rep. Ford).

[9] The consultation requirement was eliminated from S. 538 in committee. *See* 133 Cong. Rec. 18,880 (1987) (remarks of Sen. Kennedy). The Senate then added a revised version of S. 538 as an amendment to H.R. 3, the Omnibus Trade and Competitiveness Act of 1987. The House-Senate conference on H.R. 3 included a modified plant closing provision in the final trade legislation. *See* H.R. Conf. Rep. No. 576, 100th Cong., 2d Sess. 1045-55 (1988), *reprinted in* 1988 U.S.C.C.A.N. 1547, 2078-88. The House and Senate adopted the trade legislation, but it was vetoed by President Reagan. *See* H.R. Doc. No. 200, 100th Cong., 2d Sess. (1988), *reprinted in* 134 Cong. Rec. 12,130 (1988). The plant closing provisions of H.R. 3 were then introduced as S. 2527, the WARN Act. Following amendment on the Senate floor, the WARN Act was approved by Congress and became law without the President's signature. *See generally* Christopher P. Yost, *The Worker Adjustment and Retraining Notification Act of 1988: Advanced Notice Required?*, 38 Cath. U. L. Rev. 675, 691 (1989).

courage effects bargaining reveals that the NLRA was in fact a foundation for the final version of the WARN Act.[10]

### C. The Department Of Labor And The Federal Courts Have Recognized The Close Relationship Between The WARN Act And The NLRA

Given Congress's intent to model the WARN Act on the NLRA and the consequent overlap in the statutes' duties and purposes, the Department of Labor naturally borrowed extensively from the NLRA in promulgating WARN Act regulations. *See, e.g.*, 20 C.F.R. § 639.3 (a)(2) (defining "independent contractors and subsidiaries" by reference to "existing legal rules"); 54 Fed. Reg. at 16045 (looking to NLRA for guidance in promulgating definition of "independent contractors and subsidiaries" in 20 C.F.R. § 639.3(a)(2)); 54 Fed. Reg. at 16044-45 (discussing promulgation of "reasonable expectation of recall" language in 20 C.F.R. § 639.3(a)(1)(i) by referring to NLRA case law).

In fact, after the WARN Act's enactment, the NLRB's General Counsel "predicted substantial interplay between the new law [the WARN Act] . . . and the nation's basic labor law administered by the NLRB." *NLRB General Counsel Outlines Overlap Between Plant Closing Law and Taft-Hartley*, 226 Daily Lab. Rep. (BNA), Nov. 23, 1988, at A-3.[11]

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[10] If the original bill's consultation requirement had survived, the analogy to NLRA-mandated effects bargaining would be unmistakable. Congress decided to accommodate business by requiring only notice, and not consultation, in the WARN Act.

[11] The following excerpt from then NLRB General Counsel Rosemary M. Collyer is illustrative:

> I think the two statutes are intended by Congress to operate essentially separately, but I think because of the borrowing of concepts, one from the other, and because of the impact on existing and future collective bargaining relationships that this statute requires . . . it is inevitable that there will be a fair amount of interplay between the [two laws].

226 Daily Lab. Rep. (BNA), Nov. 23, 1988, at A-3 (brackets in original).

This prediction has materialized. The federal courts, like the Department of Labor, have borrowed extensively from the NLRA—not just to identify a limitations period for WARN Act claims—but to fill other gaps in the WARN Act as well. *See, e.g., Carpenters Dist. Council of New Orleans & Vicinity v. Dillard Dep't Stores, Inc.*, 15 F.3d 1275, 1283 (5th Cir. 1994) (citing NLRB principles regarding back pay), *cert. denied*, 63 U.S.L.W. 3562 (U.S. Jan. 24, 1995); *Damron v. Rob Fork Mining Corp.*, 945 F.2d 121, 124 (6th Cir. 1991) (analyzing WARN Act's "reasonable expectation of recall" language according to NLRB guidelines); *Washington v. Aircap Indus., Inc.*, 860 F. Supp. 307, 312 (D.S.C. 1994) (citing NLRB principles regarding "back pay"); *Bradley v. Sequoyah Fuels Corp.*, 847 F. Supp. 863, 868 (E.D. Okla. 1994) (applying NLRB guidelines regarding "temporary layoff" and "reasonable expectation of recall"); *United Mine Workers of Am., Dist. 2 v. Florence Mining Co.*, 855 F. Supp. 1466, 1479 n.18 (W.D. Pa. 1994) (citing NLRB principles regarding single-employer test); *Washington v. Aircap Indus. Corp.*, 831 F. Supp. 1292, 1296 (D.S.C. 1993) ("If the [WARN Act] regulations are not definitive, it may be appropriate to borrow definitions and factors employed by the [NLRB]."); *Local 397, Int'l Union of Electronic Workers v. Midwest Fasteners, Inc.*, 779 F. Supp. 788, 796 (D.N.J. 1992) (applying NLRB principles in single-employer analysis).

### D. The NLRA And The WARN Act Protect Both Represented And Unrepresented Employees

Despite the commonality of purpose and similarity of elements between the NLRA and the WARN Act, the Third Circuit rejected the analogy by asserting that the WARN Act provides a substantive right to all employees, while the NLRA merely protects the collective bargaining process. (Pet. App. 10a). In doing so, the Third Circuit misapprehended this Court's borrowing analysis and demonstrated a fundamental lack of understanding of the substantive breadth and purpose of both the NLRA and the WARN Act.

First, a strict identity of purposes is not a prerequisite for importing a limitations period from one federal statute to another. If this were the case, no federal limitations period would ever serve as a borrowing source, because no two federal statutes are perfectly analogous, *i.e.* there will always be some substantial difference between different federal statutes. Indeed, in *Agency Holding Corp.*, this Court held that civil RICO claims were subject to the four-year limitations period from the Clayton Act, notwithstanding the different purposes of the two statutes, *e.g.* the Clayton Act is directed against anticompetitive activity, while RICO is directed against organized crime. *See Agency Holding Corp.*, 483 U.S. at 151.

Second, as noted above, Congress intended that the WARN Act would provide not only a substantive right to employees, but also "provide an opportunity for the employer and the representative of the affected employees to explore alternatives to a proposed closing or mass layoff." H.R. Rep. 285, 100th Cong., 1st Sess. 32 (1987). Thus, the WARN Act was intened to offer a process to explore alternatives to imminent dislocation, as well as substantive rights.

Third, while the NLRA does facilitate collective bargaining, it also protects the individual right of all employees, both represented and unrepresented, to engage in concerted action for mutual aid or protection. *See* 29 U.S.C. §§ 151, 157. Indeed, Section 7 of the NLRA ensures that both represented and unrepresented workers have the right to act together, outside of the collective bargaining process and even outside of the immediate employer-employee relationship, to improve working conditions. *See, e.g., Eastex, Inc. v. NLRB*, 437 U.S. 556, 564-67 (1978); *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 14 (1962).[12] Notably, WARN Act notice may induce con-

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[12] The ambit of Section 7 is extremely broad. Employee activity is protected so long as it is of a "concerted" nature, even if it is

certed activity protected by the NLRA as workers attempt to save their jobs. *See* S. Rep. No. 62, 100th Cong., 1st Sess. 11 (1987) (noting that advance notice of one plant closing "allowed workers enough time to purchase the plant and turn its fortunes around").

In sum, the WARN Act is an outgrowth of the NLRA that extends the right to advance notice of plant closings to both represented and unrepresented employees. The NLRA and the WARN Act share a common purpose and similar elements. Because these two interrelated federal labor statutes both aim to ameliorate the hardships of impending employment loss, the NLRA provides an obvious analogous source for the WARN Act's statute of limitations.

**E. State Law Offers No Analogy To The WARN Act**

The WARN Act is a statutory creation without common law roots. Thus, not surprisingly, in contrast to the NLRA, no state law cause of action provides any analogy to the WARN Act. The Court of Appeals for the Third Circuit was unable to fix upon any single analogous state statute and instead vaguely proffered four possible Pennsylvania limitations periods: (1) the six-year residual statute of limitations, 42 Pa. Cons. Stat. Ann. § 5527; (2) the four-year limitations period for breach of contract, 42 Pa. Cons. Stat. Ann. § 5525; (3) the two-year limitations period for an action for a civil penalty, 42 Pa. Cons. Stat. Ann. § 5524(5); and (4) the three-year limitations period of the Pennsylvania Wage Payment and

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unrelated to union organization or the collective bargaining process. *See, e.g., NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822, 841 (1984) (truck driver's refusal to drive unsafe truck was protected concerted activity); *Eastex, Inc.*, 437 U.S. at 569-70 (union's attempted distribution of newsletter urging employees to oppose state right-to-work statute was protected concerted activity); *Washington Aluminum Co.*, 370 U.S. at 15 (unrepresented employees who walked off the job because it was too cold engaged in protected concerted activity); 1 Hardin, *The Developing Labor Law*, 72-73, 137-146 (3d ed. 1992).

Collection Law, 43 Pa. Stat. Ann. § 260.9a(g). Absent from all of these options is the "commonality of purpose" and "similarity of elements" which the WARN Act shares with the NLRA. Indeed, even a cursory examination of the above limitations periods leaves little doubt that the NLRA provides a far closer analogy than the state laws identified by the Court below, which in essence provides no analogy at all.

#### 1. *Pennsylvania's Residual Statute Of Limitations Is An Unsuitable Analogy To The WARN Act*

Pennsylvania's six-year residual statute of limitations, 42 Pa. Cons. Stat. Ann. § 5527, should be rejected as a borrowing source for several reasons. First, in *Agency Holding Corp.*, this Court rejected the use of Pennsylvania's residual limitations period as a suitable borrowing source, noting that it is "unlikely that Congress would have intended such a statute of limitations to apply." 483 U.S. at 153. Indeed, a residual limitations period "in essence provides no analogy" at all. *United Mine Workers of Am. v. Peabody Coal Co.*, 38 F.3d 850, 856 (6th Cir. 1994).

Moreover, not all states have residual limitations periods, and it would therefore be impossible to borrow these periods on a uniform basis. *Agency Holding Corp.*, 483 U.S. at 153. For these reasons, Pennsylvania's residual limitations period is an inappropriate borrowing source for the WARN Act. Undeniably, it is less analogous to the WARN Act than the limitations period of the NLRA.

#### 2. *A WARN Act Claim Is Not Analogous To A Contract Claim*

The WARN Act is a statute designed to provide notice to dislocated workers, their representatives and local government so that assistance can quickly be provided. 29 U.S.C. § 2102; 20 C.F.R. §§ 639.1, 639.2. The WARN Act makes no provisions for contractual dam-

ages, and it does not by its own terms alter or affect any contractual rights. *See* 29 U.S.C. §§ 2104(a)(2)(B), 2105; 20 C.F.R. § 639.1(g).

Indeed, the WARN Act lacks all indicia of contract. There is no bargain to be struck, no *quid pro quo*. An employee has no obligation, for example, to continue to work for a sixty-day or other period in exchange for WARN Act notice. With no bargain, no meeting of the minds, and no consideration, the WARN Act cannot plausibly be said to create obligations analogous to those imposed by contract.

Moreover, the WARN Act requires an employer to notify not only employees, but also governmental units with whom the employer has had no prior contractual relationship. 29 U.S.C. § 2102(a). Contract claims have different purposes and elements than WARN Act claims and provide an inapt analogy for statute of limitations borrowing purposes.

#### 3. *The WARN Act Is Neither Analogous To The Pennsylvania Civil Penalty Provision Nor To The Pennsylvania Wage Payment And Collection Law*

Pennsylvania provides a two-year statute of limitations for "[a]n action upon a statute for a civil penalty or forfeiture." 42 Pa. Cons. Stat. Ann. § 5524(5). This limitations period is an inappropriate borrowing source for two reasons.

First, the Union seeks to recover compensatory damages, not a civil penalty. Under the WARN Act, employees are entitled to back pay and certain benefits for the period of the violation, 29 U.S.C. § 2104(a)(1); this is a simple way to approximate the damages caused by a WARN Act violation. Thus, the WARN Act provides only "a limited *compensatory* damage remedy" to employees. *Newspaper & Mail Deliverers' Union v. United Magazine Co.*, 809 F. Supp. 185, 192 (E.D.N.Y. 1992)

(emphasis added); *see also Finnan v. L.F. Rothschild & Co.*, 726 F. Supp. 460, 464 (S.D.N.Y. 1989) (characterizing payments to employees under the WARN Act as "compensatory damages"). It is well settled that compensatory damages are not penalties. *See, e.g., Tull v. United States*, 481 U.S. 412, 422 (1987); *General Motors Corp. v. Devex Corp.*, 461 U.S. 648, 656 n.10 (1983).

Moreover, the WARN Act describes an employer's liability to an employee as "back pay." 29 U.S.C. § 2104 (a)(1)(A). Congress is presumed to know the meaning of the words it uses and to intend their plain and ordinary application. *See, e.g., Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 97 (1983). Congress clearly could have, but did not, label the employer's liability to the employee as a "penalty."

Second, the civil penalty limitations period was not crafted to apply to notice obligations, which is the WARN Act's purpose. 29 U.S.C. § 2102; 20 C.F.R. §§ 639.1, 639.2. There is no identity of purpose between the WARN Act and a statute providing for a civil penalty or forfeiture.

Pennsylvania's Wage Payment and Collection Law, 43 Pa. Stat. Ann. § 260.1 *et seq.* ("WPCL"), allows employees to recover earned but unpaid wages and benefits. 43 Pa. Stat. Ann. § 260.3. It contains a three-year limitations period, 43 Pa. Stat. Ann. § 260.9a(g), which is also an inappropriate borrowing source for the WARN Act.

First, the purpose of the WPCL is to limit an employer's ability to defer unfairly the payment of compensation that has already been earned by the employee. *See Emgee Engineering Co. v. Unemployment Compensation Bd. of Review*, 30 Pa. Commw. 290, 293-94, 373 A.2d 779, 781-82 (1977). This has no relation to the WARN Act's purpose, which is the provision of advance notice of plant closings and mass layoffs.

Second, WPCL claims are premised on a contractual obligation. An employee may recover only wages previously *earned*. *Id.; Weldon v. Kraft, Inc.*, 896 F.2d 793, 801 (3d Cir. 1990) (WPCL provides a "remedy when the employer breaches a contractual obligation to pay earned wages. The contract between the parties governs in determining whether specific wages are earned."); *Sendi v. NCR Comten, Inc.*, 619 F. Supp. 1577, 1579 (E.D. Pa. 1985) (same), *aff'd*, 800 F.2d 1138 (3d Cir. 1986). WARN Act damages, in contrast, are provided by statute, not contract, and are certainly not "earned" by an employee. Hence, the WPCL does not offer an appropriate source for the WARN Act's statute of limitations.

## III. THE WARN ACT'S POLICIES AND THE PRACTICALITIES OF LITIGATION FAVOR BORROWING A LIMITATIONS PERIOD FROM THE NLRA

In addition to offering the closest analogy to the WARN Act, the NLRA's limitations period will further the "federal policies at stake" in and effectively deal with the practicalities of WARN Act litigation. Thus, the WARN Act should be governed by the uniform limitations period from its closest analogy—the NLRA.

### A. The WARN Act's Structure And Purpose Support Swift Filing Of Claims

As an initial matter, successful enforcement of the WARN Act hinges upon a statute of limitations that encourages prompt litigation. Congress enacted the WARN Act to provide advance notice of imminent dislocation and to afford employees and the government the opportunity to promptly provide assistance. *See* 20 C.F.R. § 639.1(a). Providing funds to workers several years after their termination would undermine congressional intent to provide an immediate cushion of time for employees to explore new job opportunities and, if necessary, seek retraining. *See* 20 C.F.R. § 639.1; *cf. Lloyd v. U.S. Department of Labor*, 637 F.2d 1267, 1270 (9th Cir.

1980) ("[T]o serve the [Trade] Act's purposes of retraining, adjustment, and relocation, it was important that workers claim and receive benefits promptly after discharge.").

By limiting the available remedies for WARN Act violations to a maximum of sixty-days back pay and benefits, 29 U.S.C. § 2104, Congress eliminated any incentive for employees to sue long after the plant closing or mass layoff in order to recover increased compensatory damages. Indeed, Congress's intent to encourage rapid claims resolution is apparent throughout the WARN Act. Congress kept the statute short and simple, stating the notice obligation, the narrow defenses, and the limited remedy in approximately five pages of text. 29 U.S.C. §§ 2101-2109. Congress also provided for simple class resolution by allowing any person to sue "for other persons similarly situated." 29 U.S.C. § 2104(a)(5). The WARN Act contains a broad venue provision which permits suits to be filed in any judicial district in which "the employer transacts business," thereby lowering the barriers to suit. 29 U.S.C. § 2104(a)(5).

In addition, the WARN Act contains an incentive for attorneys to pursue WARN claims by allowing the award of attorney's fees to prevailing parties. 29 U.S.C. § 2104(a)(6). Borrowing multi-year limitations periods would thwart this simple scheme of rapid collective enforcement and liquidated damages.

Moreover, an obvious WARN Act litigation practicality arises from its very subject matter—plant closings and mass layoffs. Laid off or terminated employees disburse over time, and the records of defunct businesses become harder to find. A short statute of limitations would thus enhance the effective litigation of these claims. *See Wilson,* 471 U.S. at 271 ("Just determinations of fact cannot be made when, because of the passage of time, the memories of witnesses have faded or evidence is lost."); *see also Johnson v. Graphic Communications*

*Int'l Union Local 303,* 930 F.2d 1178, 1182 (7th Cir. 1991) (NLRA limitations period prevents litigation after records have been destroyed and witnesses have relocated), *cert. denied,* 502 U.S. 862 (1991).

Indeed, Congress added a six-month limitations period to Section 10(b) of the NLRA in 1947, *see* Labor-Management Relations Act, sec. 101, § 10(b), 61 Stat. 136, 146 (1947), to ensure that the NLRB did not issue complaints "after records have been destroyed, witnesses have gone elsewhere, and recollections of the events in question have become dim and confused." H.R. Rep. No. 245, 80th Cong., 1st Sess. 40 (1947), *reprinted in* 1 NLRB, *Legislative History of the Labor-Management Relations Act, 1947,* at 292, 331 (1959). The same concerns are presented by WARN Act litigation.

**B. Federal Law Favors Rapid Resolution Of Employment Disputes**

In addition, the NLRA's six-month limitations period is an appropriate choice, because it furthers the broader federal policy favoring the rapid resolution of employment disputes. *See DelCostello,* 462 U.S. at 171. This policy is particularly important when employees have a union representative. As in this case, unions often have a continuing bargaining relationship with a company, even following a plant closing or mass layoff. Allowing unions to defer WARN Act claims would undermine federal policies favoring stable bargaining relationships and the speedy resolution of labor disputes.

This federal policy is evident not only in the context of traditional labor law, such as Section 10(b) of the NLRA, but also in the series of federal employment laws governing the relationship between employers and their employees. The Age Discrimination in Employment Act ("ADEA"), Title VII of the Civil Rights Act of 1964 ("Title VII"), and the Americans with Disabilities Act ("ADA"), generally require that an individual file a charge of discrimination with the Equal Employment Op-

portunity Commission ("EEOC") within 180 days after the occurrence of the discriminatory event. *See* 29 U.S.C. § 626(d)(1) (180-day filing period under ADEA); 42 U.S.C. § 2000e-5(e)(1) (180-day filing period for Title VII claims); 42 U.S.C. § 12117 (importing enforcement provision of Title VII into the ADA); *see also* 5 U.S.C. § 7118(b) (providing that federal employees must file unfair labor practice charges within six-months).[13]

### C. WARN Act Plaintiffs Have Been Able To File Claims Within Six Months

Because of the WARN Act's simplicity, plaintiffs, both represented and unrepresented, have had no difficulty commencing actions under the WARN Act within six

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[13] The statutes of limitations of virtually every state also include limitations periods of six months or less in the employment setting. *See, e.g.*, Arizona Civil Rights Act, Ariz. Rev. Stat. Ann. § 41-1481(A); Colorado Anti-Discrimination Act, Colo. Rev. Stat. § 24-34-403; Connecticut Human Rights and Opportunities Law, Conn. Gen. Stat. § 46a-82(e); Georgia Fair Employment Practices Act, Ga. Code Ann. § 45-19-36(b); Illinois Human Rights Act, Ill. Rev. Stat. ch. 775 ¶ 7A-102(A); Iowa Civil Rights Act, Iowa Code § 216.15(12); Kentucky Equal Pay Law, Ky. Rev. Stat. § 337.430; Maine Human Rights Act, Me. Rev. Stat. Ann. tit. 5 § 4611; Maryland Fair Employment Practices Act, Md. Ann. Code Art. 49B § 9A; Missouri Civil Rights Act, Mo. Rev. Stat. § 213.075(1); Nevada Fair Employment Practices Act, Nev. Rev. Stat. § 613.430; New Hampshire Law Against Discrimination, N.H. Rev. Stat. Ann. § 354-A:21(III); New Jersey Law Against Discrimination, N.J. Stat. Ann. § 10:5-18; New Mexico Human Rights Act, N.M. Stat. Ann. § 28-1-10(A); North Carolina Communicable Disease Law, N.C. Gen. Stat. § 130A-148; North Carolina Handicapped Person Protection Act, N.C. Gen. Stat. § 168A-12; Oklahoma Anti-Discrimination Act, Okla. Stat. tit. 25 § 1502(a); Pennsylvania Human Relations Act, 43 Pa. Cons. Stat. Ann. § 959(h); South Carolina Law Against Discrimination, S.C. Code Ann. § 1-13-90(a); Tennessee Anti-Discrimination Law, Tenn. Code Ann. § 4-21-302(c); Texas Employment Discrimination Law, Tex. Lab. Code Ann. § 21.202; Virginia Human Rights Act, Va. Code Ann. § 2.1-719; Washington Family Leave Act, Wash. Rev. Code § 49.78.140(1).

months.[14] Hence, the Third Circuit's fear that a "short statute of limitations could very well frustrate the policies behind WARN" (Pet. App. 14a), was misplaced. Though the Third Circuit expressed concern that the WARN Act lacked an administrative enforcement scheme (Pet. App. 14a), Congress rightly believed that WARN Act claims were simple enough to be resolved directly in the courts without administrative intervention. The WARN Act is short and simple; it provides workers with generous venue provisions, simplified class procedures, and attorney's fees in lieu of an administrative process. 29 U.S.C. §§2101-2109. "Indeed, the absence of a 'complex administrative structure' may be emblematic of the simplicity of a WARN claim." *Halkias*, 31 F.3d at 239 n.35; *see also Carpenters Dist. Council*, 15 F.3d at 1284 n.14 (noting that Congress might have designed the WARN Act to effectuate a "desire for simplicity in the statutory scheme").

Moreover, this Court borrowed the NLRA's six-month statute of limitations in *DelCostello*, notwithstanding the fact that the individual claimant lacked an administrative remedy. 462 U.S. at 172. This Court noted the difficulty

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[14] *See, e.g., Jurcev v. Central Community Hosp.*, 7 F.3d 618 (7th Cir. 1993) (within two weeks), *cert. denied*, 114 S. Ct. 1830 (1994); *Local 217, Hotel & Restaurant Employees Union v. MHM, Inc.*, 976 F.2d 805, 807 (2d Cir. 1992) (within approximately five months of hotel closing); *Salyer v. Universal Concrete Prods.*, 940 F.2d 662 (6th Cir. 1991) *reprinted in full* at 1991 U.S. App. LEXIS 17620 (approximately three months); *Johnson v. Peters Truck Lines*, 8 I.E.R. Cases (BNA) 1036 (N.D. Cal. 1993) (approximately one month); *Moore v. On-Line Software Int'l, Inc.*, 8 I.E.R. Cases (BNA) 1089 (N.D. Ill. 1993) (within six months); *Washington v. Aircap Indus. Corp.*, 8 I.E.R. Cases (BNA) 1426 (D.S.C. 1992) (within six months); *Solberg v. Inline Corp.*, 740 F. Supp. 680 (D. Minn. 1990) (within six months); *Finkler v. Elsinore Shore Associates*, 725 F.Supp. 828 (D.N.J. 1989) (within six months); *Parsley v. Kunja Knitting Mills, USA, Inc.*, 7 I.E.R. Cases (BNA) 225 (D. Mass. 1989) (approximately six weeks); *In re Mr. Goodbuys of New York Corp.*, 164 B.R. 24 (Bankr. E.D.N.Y. 1994) (adversary proceeding brought within five months); *In re Riker Indus., Inc.*, 151 B.R. 823 (Bankr. N.D. Ohio 1993) (proof of claim filed within one month).

faced by an individual claimant in the context of a "hybrid action," but nonetheless endorsed the use of a six-month statute of limitations. *DelCostello*, 462 U.S. at 166; *see also Burnett v. Grattan*, 468 U.S. 42, 61 (1984) (Rehnquist, J., concurring) (noting this Court's willingness to impose a six-month limitations period on an individual claimant).

Many WARN Act plaintiffs are unions accustomed to the rapid filing and resolution of labor disputes. Even unrepresented plaintiffs do not face significant difficulty in filing a WARN Act suit. A plaintiff generally will be aware of a potential WARN violation when he/she loses a job without notice. The plain and simple nature of the statutory violation, together with an attorney's fees provision which encourages the swift involvement of counsel, has allowed plaintiffs to file WARN Act claims promptly.

### D. Borrowing State Limitations Periods Would Encourage Forum Shopping, Create Uncertainty And Guarantee Complex And Expensive Collateral Litigation

Because of the WARN Act's broad venue provision, which permits an action to be brought in any district "in which the employer transacts business," 29 U.S.C. § 2104 (a)(5), the use of state limitations periods will "present the danger of forum shopping." *Agency Holding Corp.*, 483 U.S. at 154. This is particularly true because in federal question cases many circuits borrow limitations period from the forum state, regardless of the site of injury.[15]

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[15] *See, e.g., Consolidated Express, Inc. v. New York Shipping Ass'n, Inc.*, 602 F.2d 494, 507-08 (3d Cir. 1979), *vacated on other grounds*, 448 U.S. 902 (1980); *Vigman v. Community Nat'l Bank & Trust Co.*, 635 F.2d 455, 459 (5th Cir. 1981); *Champion Int'l Corp. v. United Paperworkers Int'l Union*, 779 F.2d 328, 333-34 (6th Cir. 1985); *Vanderboom v. Sexton*, 422 F.2d 1233, 1236-37 (8th Cir. 1970), *cert. denied*, 400 U.S. 852 (1970); *Forrestal Village, Inc. v. Graham*, 551 F.2d 411, 413 (D.C. Cir. 1977); *see also International Union, UAW v. Hoosier Cardinal Corp.*, 383 U.S. 696, 705 n.8 (1966).

Indeed, in this case, the Union opted to sue Crown in Pennsylavnia for an alleged WARN Act violation which occurred 700 miles away at a Georgia plant. Nonetheless, the Third Circuit noted that a Pennsylvania limitations period would likely apply. (Pet. App. 14a n.4). If WARN Act claims are governed by state limitations periods, potentially tardy plaintiffs will be able to shop for a hospitable forum limitations period and employers, employees and unions will be forced to litigate in otherwise inconvenient jurisdictions.

Moreover, rather then allaying concerns of forum-shopping, unpredictability and uncertainty, choice of law rules guarantee complex and time-consuming litigation over collateral matters. Some circuit courts do not adopt the forum state's statute of limitations but look to the limitations period of the state with the dominant contacts. *See Edelman v. Chase Manhattan Bank, N.A.*, 861 F.2d 1291, 1294 (1st Cir. 1988); *Chung v. Pomona Valley Community Hosp.*, 667 F.2d 788, 791 (9th Cir. 1982). In those circuits, preliminary and possibly dispositive choice of law issues will guarantee complex and time-consuming litigation over collateral matters, and undermine the WARN Act's uniform character and scope. *See Agency Holding Corp.*, 483 U.S. at 154.

This danger is particularly acute in the WARN Act context, because WARN Act suits can include claims from multiple states. *See, e.g., Halkias*, 31 F.3d at 237 (class action filed in Texas for plant closings in Texas, Oklahoma and Missouri); *OPEIU v. Sea-Land Services Inc.*, 6 I.E.R. Cases (BNA) 1064, 1064 (S.D.N.Y. 1991) (action filed in New York for layoffs in New York and New Jersey).

That employment decisions would have multi-state consequences for WARN Act purposes is no surprise. The interstate nature of the WARN Act is evident on its face. First, the WARN Act recognizes that many manufacturing concerns operate in more than one state. *See* 20 C.F.R. § 639.3(a)(4) ("An example of [common ownership of

multiple sites] would be a major auto maker which has dozens of automobile plants throughout the country."). Second, the WARN Act provides that liability to an individual may hinge on the employer's willingness or ability to "offer[] to transfer the employee to any other site of employment *regardless of the distance.*" 29 U.S.C. § 2101(b)(2)(B) (emphasis added). Third, in determining whether an employer is even covered by the Act, the WARN Act provides for a nationwide count of full-time employees. 29 U.S.C. § 2101(a)(1).

In addition, the Department of Labor, in its comments to the Final Rule, recognized this multi-location effect:

> Commentors raised the question whether notice extends to bumpees who may be bumped at other employment sites . . . . DOL interprets the definition of affected employees to include such workers, who are, therefore entitled to receive notice. . . . It is also possible that an employment action that affects large numbers of workers may trigger a second covered action at a separate site if enough workers lose their jobs through cross-plant bumping.

54 Fed. Reg. at 16047.[16]

Moreover, given the WARN Act's broad venue provision, many employers would be wholly unable to determine beforehand which limitations period would govern a potential WARN Act claim. Hence, state law borrowing would leave defendants unable to " 'calculate their contingent liabilities, not knowing with confidence when their delicts lie in repose.' " *Agency Holding Corp.*, 483 U.S. at 150 (quoting *Wilson*, 471 U.S. at 275 n.3). This would undermine the utility of a limitations period.

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[16] Moreover, since WARN covers all types of occupations, some of which transcend state boundaries (*e.g.* sales persons working a territory comprised of multiple states), complex choice of law issues abound.

## CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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